

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED SEP 30 2004 CLERK, U.S. DISTRICT COURT By _____ Deputy
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UNITED STATES OF AMERICA, and
STATE OF TEXAS,

Plaintiffs,

v.

CITY OF PLAINVIEW, TEXAS,

Defendant.

CIVIL ACTION NO.

5-04CV0218-C

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of Texas, by and through the Texas Commission on Environmental Quality ("TCEQ"), files this Complaint and alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action for injunctive relief and civil penalties brought under Section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319, against the defendant, the City of Plainview, Texas ("Plainview"), for the discharge of pollutants to the waters of the United States in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), and for the violation of effluent limitations and other conditions established in the National Pollutant Discharge Elimination

System ("NPDES") permit issued to Plainview pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

2. The State of Texas is a plaintiff in this action and is joined as a party under Section 309(e) of the Act, 33 U.S.C. § 1319(e). Whenever a municipality is a party to a civil action brought by the United States under Section 309, the Act requires the State in which the municipality is located to be joined as a party.

JURISDICTION, VENUE, AND NOTICE

3. This Court has jurisdiction of the subject matter and of the parties pursuant to Sections 309(b) and (e) of the Act, 33 U.S.C. §§ 1319(b) and (e), and 28 U.S.C. §§ 1331, 1345 and 1355.

4. Venue is proper in this judicial district pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (d), and 1395(a), because this is the district where Plainview is located and the district in which the violations occurred.

5. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), notice of the commencement of this action has been given to the State of Texas, which joins in this action as a co-plaintiff.

THE PARTIES

6. Plaintiff United States of America is acting at the request and on behalf of the Administrator of the EPA. The United States has the authority to bring this action on behalf of the Administrator of the EPA under Section 506 of the Act, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

7. Plaintiff State of Texas is acting at the request and on behalf of the Commissioners of the TCEQ. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, EPA has authorized the State of Texas, through the TCEQ, to administer the NPDES permitting program in Texas. Texas is a party to this action pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e).

8. Defendant Plainview is a political subdivision of the State of Texas, duly chartered and formed under the laws of the State of Texas, and is a “municipality” within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4), and 40 C.F.R. § 122.2.

9. Defendant Plainview, a municipality, is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

FEDERAL STATUTES AND REGULATIONS

10. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant” except as authorized by, and in compliance with, certain enumerated sections of the Act, including Section 402 of the Act, 33 U.S.C. § 1342.

11. The term “discharge of a pollutant” is defined in Section 502(12) of the Act, 33 U.S.C. § 1362(12), to mean “any addition of any pollutant to navigable waters from any point source”

12. The term “pollutant” is defined in Section 502(6) of the Act, 33 U.S.C. § 1362(6), to include, but is not limited to, sewage, biological materials, and municipal waste.

13. The term “navigable waters” is defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), to mean “the waters of the United States, including the territorial seas.”

14. The term “point source” is defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14), to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged.”

15. Pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a), the Administrator may issue a permit, known as the National Pollutant Discharge Elimination System (“NPDES”) permit, that authorizes the discharge of a pollutant into navigable waters, upon the condition that such discharge shall meet the requirements of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and such conditions as the Administrator determines are necessary to carry out the provisions of the Clean Water Act.

16. Pursuant to Section 301 of the Act, 33 U.S.C. § 1311, and Section 402 of the Act, 33 U.S.C. § 1342, the Administrator is authorized to specify effluent limitations in NPDES permits. Effluent limitations include – but are not limited to – restrictions on the quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges into navigable waters, as defined in Section 502(11) of the Act, 33 U.S.C. § 1362(11).

17. Pursuant to 40 C.F.R. § 122.41(e), promulgated under the Act, a standard condition in all NPDES permits is that “the permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of th[e] permit.”

18. Pursuant to 40 C.F.R. § 403.3(o), promulgated under the Act, the term “publicly owned treatment works” (“POTW”) is defined as “a treatment works,” (as that term is defined under Section 212 of the Act, 33 U.S.C. § 1292, and 40 C.F.R. 122.2), that treats municipal

sewage and is owned by a State or municipality. This definition includes the “sewers, pipes and other conveyances” which convey sewage to the sewage plants.

19. Pursuant to Section 308 of the Act, 33 U.S.C. § 1318, and Section 402 of the Act, 33 U.S.C. § 1342, the Administrator may require the holder of the NPDES permit to monitor and report the pollutant level in its discharged waste water. Such Reports are referred to as Discharge Monitoring Reports (“DMRs”), 40 C.F.R. § 122.41. Further, the Administrator is authorized to specify effluent sampling methods and frequencies in NPDES permits.

20. Pursuant to 40 C.F.R. § 122.41(l), promulgated under the Act, the permittee must submit DMRs to the EPA according to the time intervals specified in the NPDES permit.

21. Pursuant to 40 C.F.R. § 122.41(l), promulgated under the Act, a standard condition of all NPDES permits requires that the permit holder report to the EPA any non-compliance that may endanger health or the environment.

22. Pursuant to 40 C.F.R. §§ 122.41(k)(1), 122.22(a)(3) and (b)(3), promulgated under the Act, a standard condition of all NPDES permits requires that a responsible executor or authorized agent of the organization controlling the point source sign, and certify as accurate, all DMRs and non-compliance reports submitted to the Administrator.

23. Pursuant to regulations at 40 C.F.R. § 122.6, a permittee may continue to discharge in accordance with the conditions of an expired permit until the effective date of a new permit if the permittee submits a timely application for a new permit and EPA, through no fault of the permittee, does not issue a new permit on or before the expiration date of the previous permit. A permit continued under this regulation remains fully effective and enforceable.

24. Section 402(b) of the Act, 33 U.S.C. § 1342(b), provides that a State may establish its own permit program and, after receiving approval of its program by the EPA, may issue NPDES permits.

25. Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), authorizes the Administrator of the EPA to “commence a civil action for appropriate relief, including a permanent or temporary injunction,” when any person is in violation of, inter alia, Section 301 of the Clean Water Act, 33 U.S.C. § 1311, or violates any permit condition or limitation implementing, inter alia, Sections 301, 308 or 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1318 or 1342.

26. Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, provide that any person who violates, inter alia, Section 301 of the Clean Water Act, 33 U.S.C. § 1311, or who violates any condition or limitation of a NPDES permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, shall be subject to a civil penalty of up to \$27,500 per day for each violation occurring after January 31, 1997.

GENERAL ALLEGATIONS

27. Plainview owns and operates a publicly owned treatment works, which is located adjacent to Running Water Draw, approximately two miles southeast of the intersection of U.S. Highway 70 and State Highway Loop 445, in Hale County, Texas (referred to hereinafter as the “Plainview POTW”).

28. The Plainview POTW is a “treatment works” as that term is defined in Section 212(2)(A) and (B) of the Clean Water Act, 33 U.S.C. § 1292(2)(A) and (B); and a “publicly owned treatment works” as that term is defined by 40 C.F.R. § 122.2 and 40 C.F.R. § 403.3(o).

29. The Plainview POTW treats and discharges domestic and commercial sewage defined as a “pollutant” under Section 502(6) of the Act, 33 U.S.C. § 1362(6), into “navigable waters” of the United States as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), from Plainview, Texas.

30. On or about January 17, 1997, the EPA Administrator issued NPDES Permit No. TX0047571 to the Plainview POTW, pursuant to Section 402(a)(1) of the Clean Water Act, 33 U.S.C. § 1342(a)(1). The permit became effective on March 1, 1997.

31. Part III(B)(3) of Permit No. TX0047571 provides that the permit holder shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances), which are installed or used by the permittee as efficiently as possible and in a manner that will minimize upsets and discharges of excessive pollutants and will achieve compliance with the conditions of the permit.

32. On July 31, 1996, EPA undertook an NPDES Compliance Inspection and issued an NPDES Compliance Inspection Report on June 16, 1997, wherein it was noted, inter alia, that the Plainview POTW was not being well operated or maintained and that the City had estimated it would cost approximately \$3 million to meet the Ammonia-Nitrogen effluent limitations in its NPDES permit that became effective March 1, 1997. The NPDES Compliance Inspection Report also noted that the City already had preliminary plans to spend \$8 million to upgrade and expand the Plainview POTW.

33. On June 5, 1997, EPA undertook an NPDES Compliance Inspection and issued an NPDES Compliance Inspection Report on April 21, 1998, wherein it was noted, inter alia, that the Plainview POTW continued to have numerous operation and maintenance failures, poor management of plant and laboratory, and failure to develop reports required under its NPDES permit.

34. Permit No. TX0047571 authorizes Plainview to discharge pollutants from Outfall 001, which is a "point source" as defined by Section 502(14), 33 U.S.C. § 1362(14), into the receiving waters named Running Water Draw, thence to the White River, thence to White River Lake in Segment No. 1240 of the Brazos River Basin, a "navigable water[]" of the United States, as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), in accordance with the effluent limitations, monitoring requirements and other conditions set forth in the Permit.

35. Permit No. TX0047571 expired on March 1, 1999; but was administratively extended in accordance with federal regulation, 40 C.F.R. § 122.6(a)(1), because Plainview submitted a complete application for a new permit with TCEQ.

36. Part I(A) of Permit No. TX0047571 provides effluent limitations for the discharge of Carbonaceous Biochemical Oxygen Demand ("CBOD"), Total Suspended Solids ("TSS"), Ammonia-Nitrogen, Dissolved Oxygen, and Fecal Coliform Bacteria from outfall serial no. 001 ("Outfall 001").

37. According to DMRs submitted by Plainview to the EPA, on hundreds of occasions between March 2000 and June 2003, the Plainview POTW violated Part I(A) of Permit No. TX0047571 by discharging pollutants into the receiving waters named Running Water Draw, thence to the White River, thence to White River Lake in Segment 1240 of the Brazos

River Basin, which exceeded the effluent limitations authorized for Ammonia-Nitrogen, CBOD, and TSS in the Permit.

38. Part I(B)(1)(b) of Permit No. TX0047571 provides that Plainview shall achieve compliance with the final effluent limitations specified for Ammonia-Nitrogen no later than three years after March 1, 1997, the effective date of the permit.

39. Plainview violated Part I(B)(1)(b) of Permit No. TX0047571 by not achieving compliance with the final effluent limitations specified for Ammonia-Nitrogen by March 1, 2000, three years after the effective date of the permit.

40. Plainview did not come into compliance with Part I(B)(1)(b) of Permit No. TX0047571 until June 2003, over three years after it was required to comply with this section of its permit.

41. On October 16, 1997, the EPA issued Administrative Order Docket No. VI-98-1002 to Plainview. The Order required the City, inter alia, to attain compliance with its NPDES permit effluent limitations and reporting and monitoring requirements. The Order also required the City to submit, within thirty days, either a written report detailing the specific actions taken to correct the violations or a comprehensive written plan for eliminating the cited violations within the shortest possible time.

42. On February 24, 1998, the EPA filed Administrative Complaint Docket No. VI-98-1620 against the City of Plainview for violating various provisions of the Clean Water Act, the Act's implementing regulations, and the terms of Plainview's NPDES permit.

43. On September 16, 1998, the EPA and Plainview entered into a Consent Agreement and Order, whereby the City agreed to pay a civil penalty in the amount of \$23,332

resulting from violations of Plainview's then existing NPDES Permit No. TX0047571 as set forth in EPA Administrative Complaint Docket No. VI-98-1620 and complete a Supplemental Environmental Project.

44. On September 20, 2000, EPA issued Administrative Order CWA-6-00-1094 to Plainview for violating various provisions of the Clean Water Act, the Act's implementing regulations, and the terms of Plainview's NPDES permit, inter alia, exceeding permitted effluent limitations for Ammonia-Nitrogen and CBOD and failing to achieve compliance with the final Ammonia-Nitrogen limitations no later than three years after March 1, 1997, the effective date of the permit. The Order required the City to take whatever corrective action was necessary to eliminate and prevent recurrence of the permit violations.

45. On October 16, 2000, Plainview received a Preliminary Design for necessary POTW improvements, designed to enable the City to meet consistently the CBOD, TSS and Ammonia-Nitrogen effluent limits in its NPDES permit, over seven months after it was required to be in compliance with the final Ammonia-Nitrogen limitations.

46. Plainview began construction of its necessary POTW improvements on October 1, 2001, over 19 months after it was required to be in compliance with the final Ammonia-Nitrogen limitations.

47. Plainview's improved POTW came on line and began meeting all of its NPDES permit limitations in June 2003, over 39 months after it was required to be in compliance with the final Ammonia-Nitrogen limitations.

48. On March 16, 2004, the State of Texas issued to the City of Plainview Texas Pollutant Discharge Elimination System ("TPDES") Permit No. 10537-001 that replaces NPDES

Permit No. TX0047571. On August 16, 2004, the State of Texas issued the City of Plainview TPDES Permit No. WQ0010537001, a minor amendment that replaces TPDES Permit No. 10537-001, issued March 16, 2004.

FIRST CLAIM FOR RELIEF

Effluent Limit Violations

49. Paragraphs 1 through 48 are realleged and incorporated here by reference.

50. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 established effluent limitations, as that term is defined at Section 502(11) of the Act, 33 U.S.C. § 1362(11), for the discharge of pollutants from the POTW's Outfall 001.

51. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 established numerical limitations on daily maximum and 30-day average concentrations of Total Suspended Solids (previously defined as "TSS"), Carbonaceous Biochemical Oxygen Demand (previously defined as "BOD"), and Ammonia-Nitrogen.

52. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 required Plainview to monitor its pollutant discharge from the POTW. The results of this pollutant monitoring are required to be submitted to the EPA and/or the State of Texas monthly in the form of a Discharge Monitoring Report (previously defined as "DMR").

53. Since March 1, 1997, and at all times relevant to this action, Plainview has submitted monthly DMRs to the EPA and/or to the State of Texas.

54. On hundreds of occasions during the three years preceding the filing of this Complaint, Plainview violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, by discharging pollutants into the receiving waters of Running Water Draw, thence to the White River, thence to White River Lake in Segment No. 1240 of the Brazos River Basin, which exceeded the effluent limitations authorized for Ammonia-Nitrogen, CBOD, and TSS in Part I(A) of Permit No. TX0047571.

55. Plainview is liable under Section 309 (d) of the Act, 33 U.S.C. § 1319 (d), for a civil penalty of up to \$27,500 per day for each violation of the effluent limitations set forth in Part I (A) of Permit No. TX0047571.

SECOND CLAIM FOR RELIEF

Compliance Schedule Violations

56. Paragraphs 1 through 55 are realleged and incorporated here by reference.

57. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 established effluent limitations, as that term is defined at Section 502(11) of the Act, 33 U.S.C. § 1362(11), for the discharge of pollutants from the POTW's Outfall 001.

58. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 established numerical limitations on daily maximum and 30-day average concentrations of Total Suspended Solids, Carbonaceous Biochemical Oxygen Demand, and Ammonia-Nitrogen.

59. Since March 1, 1997, and at all times relevant to this action, NPDES Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001 required

Plainview to monitor its pollutant discharge from the POTW. The results of this pollutant monitoring are required to be submitted to the EPA and/or the State of Texas monthly in the form of a Discharge Monitoring Report.

60. Since March 1, 1997, and at all times relevant to this action, Plainview has submitted monthly DMRs to the EPA and/or the State of Texas.

61. During the three years preceding the filing of this Complaint, Plainview violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, by failing to achieve compliance with the final effluent limitations specified for Ammonia-Nitrogen no later than three years after the effective date of the Permit, March 1, 2000, as required by Part I(B)(1)(b) of Permit No. TX0047571.

62. Plainview did not achieve compliance with the final effluent limitations specified for Ammonia-Nitrogen until June 2003.

63. Plainview is liable under Section 309(d) of the Act, 33 U.S.C. § 1319 (d), for a civil penalty of up to \$27,500 per day for each violation of the compliance schedule requirements set forth in Part I(B)(1)(b) of Permit No. TX0047571.

THIRD CLAIM FOR RELIEF

Operation and Maintenance Violations

64. Paragraphs 1 through 63 are realleged and incorporated here by reference.

65. Since March 1, 1997, and at all times relevant to this action, Part III(B)(3) of Plainview's NPDES Permit No. TX0047571, subsequent TPDES Permit Nos. 10537-001 and WQ0010537001, and 40 C.F.R. § 122.41 (e) required Plainview to "at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances)

which are installed or used by the [Plainview]" and to "achieve compliance with the conditions of this permit."

66. Since March 1, 1997, and at all times relevant to this action, Plainview has failed to meet the requirements of Part III(B)(3) of its NPDES Permit No. TX0047571, subsequent TPDES Permit Nos. 10537-001 and WQ0010537001, and 40 C.F.R. § 122.41 (e).

67. Plainview is liable under Section 309(d) of the Act, 33 U.S.C. § 1319 (d), for a civil penalty of up to \$27,500 per day for each violation of the operation and maintenance requirements set forth in Part III(B)(3) of Permit No. TX0047571.

68. Plainview will continue to violate Part III(B)(3) of Permit No. TX0047571 and subsequent TPDES Permit Nos. 10537-001 and WQ0010537001, as well as 40 C.F.R. § 122.41(e), promulgated under the Act, by failing to properly operate and maintain all facilities and systems of treatment and control which are installed or used by the permittee at the Plainview POTW, unless ordered by the Court to comply with its NPDES permit, subsequent TPDES Permits, and the Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the United States of America and the State of Texas, respectfully pray that this Court provide the following relief:

1. A permanent injunction directing defendant Plainview to take all steps necessary to remain in permanent, consistent compliance with the Clean Water Act, the regulations promulgated thereunder, and its NPDES permit;
2. A permanent injunction directing defendant Plainview to implement and comply with a comprehensive Management, Operation and Preventative Maintenance Program;

3. A judgment assessing civil penalties against defendant;
4. A judgment awarding the United States and the State of Texas the costs of this action;

and

5. Such further relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

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